



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-9*

FACTS:

Quincy Hospital is a municipal hospital, established pursuant to St. 1919, c. 134 (as amended and supplemented by ordinances of the City) to “construct and maintain a hospital for the reception, care and treatment of persons who by reason of misfortune or poverty may require temporary medical or surgical relief and treatment for sickness or injuries.” Among the hospital’s objectives are to develop a community hospital, to fulfill community service needs, to attract physicians, to promote and participate in scientific research, and to provide hospital facilities and services for the care and treatment of persons who are acutely ill and who require the care and services “customarily furnished most effectively by hospitals which may be financed pursuant to Section 242 of the National Housing Act.” See Quincy Hospital By-laws Preamble. The Hospital is governed by a Board of Managers (Board) appointed by the Mayor. The Board is responsible for, among other things, the general management of the Hospital, appointing the Hospital’s director, establishing a budget, requiring the Medical staff to establish by-laws, charging the medical staff with providing a high quality of medical care, and determining the standards for and verifying the qualifications of physicians who request privileges to practice medicine at the Hospital. Quincy Hospital By-laws Article II.

Physicians who wish to practice medicine or admit patients to the Hospital are required to apply for privileges and appointment to the Medical Staff. According to Joint Commission for Accreditation of Hospitals (JCAHO) standards, each hospital is required to form “a single organized medical staff that has overall responsibility for the quality of the professional services provided by individuals with clinical privileges as well as the responsibility of accounting..to the governing body.” 1987 JCAHO Accreditation Manual for Hospitals, MS.1.^{1/} Individuals who are granted privileges to admit to the Hospital are required to be members of the Medical Staff. Quincy Hospital Medical Staff By-laws, JCAHO Standard MS. 4.3. JCAHO defines clinical privileges as “permission to provide medical or other patient care services in the granting institution, within well-defined limits, based on the individual’s professional license and his experience, competence, ability, and judgment.” 1987 JCAHO Accreditation Manual for Hospitals, MS.1.

At the Hospital, physicians apply for privileges and medical staff appointment at the same time. Most of the physicians at the Hospital also hold appointments and privileges at other hospitals. Members of the medical staff will review a physician applicant’s credentials and will provide a recommendation to the Board of Managers concerning appointment and privileges. The Board of Managers may accept the recommendation, reject the recommendation or seek further information. Quincy Hospital Medical Staff By-laws. Articles VI. An initial appointment is valid for a period of one year. Each re-appointment is valid for a two year period. Medical Staff By-laws, Article VI. Each physician is granted specific delineated privileges and the scope of the physician’s practice within the hospital is defined by those privileges. Medical Staff By-laws, Article III.^{2/}

There are various categories of medical staff membership. Most physicians are members of the active Medical Staff. Active staff members, who are voting members of the Medical Staff, may admit patients to the Hospital, hold positions within the Medical Staff, become Chairmen of the clinical departments, and serve on medical staff committees. Physicians who are appointed to the Courtesy Medical Staff are not eligible to vote or hold office in the Medical Staff, are limited to admitting no more than six patients during a twelve month period and are not required to serve on Committees. Consulting Staff Members are physicians who are considered to be experts in their fields. These physicians may not admit patients to the hospital, are not eligible to vote or hold office within the Medical staff, and are not required to sit on Committees. These physicians are permitted to perform special procedures or examinations on patients at the request of a member of the Active or Courtesy staff. Members on the Honorary Staff are senior physicians who have been recognized for their service to the

Hospital, or their reputation, or contributions to patient care. These physicians do not have admitting privileges, are not eligible to hold Medical Staff office, or to vote, or to serve on Committees. Medical Staff By-laws, Article IV.

Physicians on the Medical Staff elect their officers and appoint Committee members without input from the Hospital Board of Managers. Physicians within each clinical department elect a department Chairman who is subject to approval by the Board of Managers, but the Board does not select, hire or interview the Department Chairmen. Medical Staff By-laws, Article XI. Active and Courtesy staff members are required to pay dues to the Medical staff, which dues are used for a general fund and an education fund. These monies are controlled by members of the Medical Staff, which has its own bank accounts and manages its own funds, separate from any City revenues. Medical staff members are required to establish by-laws, subject to the approval of the Board of Managers, but neither the Medical Staff nor the Board may unilaterally amend the medical staff by-laws. JCAHO Accreditation Manual MS.2.1. The Medical Staff does not receive any funding from the Hospital or the City. The primary purpose of the medical staff as an organization is to ensure that all patients receive optimal care, to monitor the quality of care and to account to the Board for quality of care issues. Medical Staff By-laws, Article II. To fulfill its purpose, the Medical Staff has established various committees, such as a physicians' credentials committee, quality assurance committee, infection control committee, critical care committee, operating room committee. Medical Staff By-laws, Article XII.

The physicians ordinarily bill their patients or the patients' insurers directly for their services and do not receive any fee from the Hospital, unless they have a contract directly with the Hospital to provide services. The amount of time that a physician spends in the Hospital is a function of the physician's specialty and the number of patients she has admitted at any given time.

QUESTION:

Are physicians who receive appointment to the Medical Staff and are granted clinical privileges considered to be municipal employees for purposes of the conflict of interest law?

ANSWER:

In the absence of additional circumstances, physicians who are appointed to the medical staff and granted clinical privileges at the hospital are not considered to be municipal employees under G.L. c. 268A, §1(g).

DISCUSSION:

This opinion presents an opportunity for the State Ethics Commission to re-evaluate and refine a prior Commission opinion, *EC-COI-85-31*, within the context of an expanded factual record. In *EC-COI-85-31*, the Commission concluded that physicians who were members of the Medical Staff were always municipal employees under the conflict of interest law. That decision focused on the medical staff as an entity, without regard to the different categories of staff membership, and focused on the role played by the medical staff in monitoring hospital quality of care issues. The opinion did not address the nature of clinical privileges. We now conclude that mere status on the Medical Staff for the purpose of exercising clinical privileges, without other factors, is insufficient to confer municipal employee status on physicians for purposes of the conflict law.

Under G.L. c. 268A, §1(g), a municipal employee is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." One of the underlying themes in prior Ethics Commission cases where individuals have been found to be public employees is that the individuals are able to exercise governmental power, participate in governmental functions, or provide services directly to a public body. *See, e.g., EC-COI-90-3* (raising funds to support and subsidize a public college); *89-1* (search for new revenue producers for public hospital); *88-24* (perform functions traditionally performed by redevelopment authority); *87-17* (advisory committee with substantive role in regulation process); *86-4* (same); *85-66* (assisting governmental function). In contrast, where individuals are not appointed or elected to perform government functions or to exercise the power of governmental office, the Commission has not found that these individuals are public employees. *See e.g., EC-COI-88-19* (agency not

a municipal entity where it is performing a public service but not a function that is inherently or exclusively governmental); 88-2 (individuals elected at municipal election not expected to perform public service, but rather to serve on political committee); 84-76 (non-profit corporation not performing function expected of a municipality); 84-65 (trust's purpose excludes trust funds from being used for essentially governmental purpose).

A physician who is appointed to the medical staff^{3/} of a public hospital like Quincy and who is granted privileges at said hospital is not performing an inherently governmental function when she exercises those privileges. In essence, granting privileges is granting a physician permission to practice medicine within the hospital.^{4/} Upon receiving privileges, a physician's loyalty does not shift to the City, but rather remains with her individual patient.^{5/} While a hospital is required to provide supportive facilities and services to patients, a hospital cannot practice medicine.^{6/} See, G.L. c. 6A, §72. The Hospital does not supervise or control the details and clinical decisions made in medical treatment and does not assign or select the physician's patients.^{7/} The Hospital does not usually bill patients for the physician's services, does not compensate physicians to be members of the Medical Staff, and does not compensate or select Department Chairmen.

We also conclude that a physician's obligation, as a Medical Staff member, to monitor care is incidental to the exercise of privileges in the treatment of patients and does not confer public employee status on the physician. The function of the Medical Staff is to monitor the quality of care provided to patients and review the professional practice of Medical Staff physicians. M. MacDonald, K. Meyer, B. Essig, *Health Care Law*, §15.02[3] (1989). Similar to other ad hoc advisory committees, a physician's obligation in medical staff committees is to provide outside expert advice in the review of other physician care and treatment of patients and to recommend improvements. This is not a function ordinarily expected of government employees as the practice of medicine is within the exclusive domain of physicians, not public hospitals. See e.g., *EC-COI-87-28*; *80-49*. See also, *IIA Aspen Systems, Hospital Law Manual*, §2-2 (1982) (governing Board relies on judgment of Medical Staff in quality of care).

In conclusion, granting staff privileges and Medical Staff appointment does not per se create public employee status, but we emphasize that if a member of the Medical Staff has additional public duties or contract obligations to the City and/or the Hospital, she will be deemed to be a municipal employee for purposes of G.L. c. 268A. For example, if a physician is hired by the City as an employee, or if the Hospital bills for the physician's services, she will be considered a municipal employee. *EC-COI-85-56*. Also, if the Hospital contracts with a physician or a physician group to provide specific services to the Hospital, each physician in the group may be a municipal employee. See *EC-COI-87-19*; *86-21*; *80-84* (contract specifically contemplates that all of the partners will provide services, so that each partner will be considered special state employee).

Date Authorized: March 12, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}Failure to comply with JCAHO standards would jeopardize a hospital's accreditation and ability to receive government payments.

^{2/}Under certain circumstances, a physician may be granted temporary privileges for no longer than thirty days to attend a specific patient or to attend patients while the physician's application is pending.

^{3/}For purposes of this opinion, we view appointment to the Medical Staff and the granting of staff privileges as synonymous because appointment only confers delineated privileges and a physician cannot admit or attend patients at the hospital without receiving an appointment. According to the Medical Staff By-laws, "[m]embership on the medical staff ... is a privilege extended by the Hospital and is not the right of any practitioner ... appointment to and membership on the Medical Staff shall confer on the appointee or member only such clinical privileges and prerogatives as recommended to the Board of Managers by the Executive Committee of the Medical Staff and granted by the Board of Managers in accordance with these By-laws. No practitioner shall admit or provide services to patients to [sic] this Hospital unless he is a member of the Medical Staff." Medical Staff By-laws, Article III. Further, for physicians who are members of the courtesy, consulting or honorary staff, appointment is largely symbolic because said members are not eligible to vote, hold office in the Medical Staff, and are not required to serve on Medical Staff Committees. See also, *IIA Aspen System, Hospital Law Manual*, §2-2 (1982); M. MacDonald, K. Meyer, B. Essig, *Health Care Law*, §15.02[1], 1989.

^{4/}An analogy can be made between the relationship of physicians to this public hospital and the relationship of attorneys to the court system. The court system is a governmental entity. Lawyers are licensed by the Commonwealth, subject to Disciplinary Rules promulgated by the Supreme Judicial Court, hold a title as Officers of the Court, and have permission to practice their profession within the Courts. Yet, a lawyer's loyalty during practice remains with her client, not the Commonwealth, and she is not considered to be a state employee solely because she is licensed to practice and does practice law in the state court system.

⁵We note that *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987) is distinguishable from your situation. The *Quinn* case involved a state employee who also served as a bail commissioner but whose compensation, similar to Medical Staff physicians, was paid by third parties, not the Commonwealth. *Id.* at 212-213. However, unlike the Medical Staff physicians, the bail commissioners perform a governmental function when they conduct bail hearings and their loyalty is to the Commonwealth, not to the individual requesting bail. According to the Supreme Judicial Court, “[t]he fact that a prisoner pays the commissioner’s fee and may receive a benefit from the commissioner’s services does not alter the fact that the commissioner is performing a service for the Commonwealth in the same way a judge or a clerk magistrate does. The bail commissioner’s duty is owed to the judicial department of the Commonwealth, and it is to conduct the bail proceedings according to law.” *Id.* at 213. Also, the bail commissioner’s duties and compensation, unlike a physician’s, are required by statute. *Id.* at 212-213.

⁶We note that a hospital may limit or deny privileges if it is unable to provide adequate services for the physician/applicant and her patients. 1987 JCAHO Accreditation Manual MS.1.2.3.

⁷The issue of governmental control is the primary question asked when a Court considers whether a physician is a public employee for purposes of G.L. c. 258, §2, the Massachusetts Tort Claims Act. See *Hopper v. Callahan*, 408 Mass. 621, 634 (1990); *Smith v. Steinberg*, 395 Mass. 666, 668 (1985); *Kelly v. Rossi*, 395 Mass. 659, 662-665 (1985). The Supreme Judicial Court has acknowledged that “the very nature of a physician’s function tends to suggest that in most instances he will act as an independent contractor. Another person, unless a physician himself, would have no right ... to exercise control over the details of the physician’s treatment of a patient; the profession is distinct and requires a high level of skill and training; and the physician must use independent judgment.” *Kelly*, 395 Mass. at 662.